IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

FRIDAY, THE 13TH JULY 2007 / 22ND ASHADHA 1929

CRL.A.No. 4 of 2001(A)

ST.94/1997 of CHIEF JUDICIAL MAGISTRATE, KASARAGOD
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APPELLANT/COMPLAINANT:

M/S. MAHARASHTRA APEX CORPORATION LTD.
KASARAGOD.

BY ADV. SRI.S.R.DAYANANDA PRABHU

RESPONDENTS/ACCUSED:
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1. M.M.GANAPATHY, S/o. M.S.MACHAIAH,
MANDANGADA, HUDIKERI POST,
VIRAJPET-571 218, COORGE DISTRICT,
KARNATAKA STATE.

2. STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

R1 BY ADV. SRI.M.P.ASHOK KUMAR
R2 PUBLIC PROSECUTOR SRI. AMJAD ALI
SRI.P.NARAYANAN
SRI.V.PHILIPMATHEW(AMICUS CURIE)

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 13/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.R.UDAYABHANU,J

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CRL.A.No.4 of 2001

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Dated this the 13th day of July,2007

JUDGMENT

The appellant is the complainant in ST.94/1997 with respect to the offence punishable under Section 138 of the Negotiable Instruments Act. The complaint is with respect to dishonour of the impugned cheque for Rs.1,23,000/- issued to the financier with respect to the hire purchase of a lorry . The cheque when presented for collection got dishonoured on the ground of insufficiency of funds.

2. The evidence adduced in the matter consisted the testimony of PWs1 and 2 and Exts. P1 to P7. The defence examined DWs1 and 2 and got marked Exts. D1 and D2.

3. According to the complainant the amounts are due from the accused towards arrears of hire amount with respect to the purchase of the lorry No.KA.12/3359. The court below held that the case of the complainant cannot be upheld in view of the fact that the amount noted in the cheque ie., Rs.1,23,000/- is excessive as the instalments dues till date could be only

Rs.1,13,064/-. The counsel for the appellant states that the amount calculated by the court is incorrect as Rs.46,736/- i.e, the initial payment to the dealer of the vehicle is not the amount paid to the financier. It is pointed out that the amount has been included towards the amount paid by the hirer. It is also pointed out that the interest due has not been calculated by the court below.

4. The other ground on which the complaint was dismissed is that notice was not served. It is pointed out that A.D card contained acknowledgment. It is, further pointed out by the complainant that subsequent to the filing of complaint summons was issued on the same address, and further as per the decision of the three member judge of the Supreme Court in **Alavi Haji V. Muhammed (2007 (3) KLT 77)** the contention with respect to the non receipt of notice has no validity, as in this case it is the same position as of a person who has not paid the amount within 15 days of the receipt of the summons as in the case mentioned in Alavi Haji's case (op.cit). It is the settled proposition that the notice sent on correct address would be sufficient compliance of proviso(b) to Section 138 [See **Raja Kumari v. Subbarama Naidu (2004 (3) KLT 799)**]

5. However, the court also held that the complainant is not entitled to initiate proceedings under Section 138 of the Negotiable Instruments Act as the hire purchase agreement in this regard provides for other remedies. The counsel for the revision petitioner has pointed out that the decision in **Sudha Beevi v. State of Kerala (2004 (2) KLT 746)** would not be applicable to the facts of the instant case as the terms of the agreement are different.

In the circumstances, I find that the entire matter is liable to be reconsidered. The finding of the court below is set aside and the matter is remitted back to the court below for fresh disposal after permitting the parties to adduce further evidence if they so desire. The parties shall appear before the court below on 18.08.2007.

K.R.UDAYABHANU,JUDGE

dvs